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Supreme Court of the United States

October Term, 1979

No. 79-2060

In re BEEF INDUSTRY ANTITRUST LITIGATION
M.D.L. DOCKET No. 248

A. L. BLACK, *et al.*,

Petitioners,

vs.

ALBERTSON'S INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The following cases were consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation as *In re Beef Industry Antitrust Litigation* (Supermarkets) and transferred to the Honorable William M. Taylor, Jr., Judge of the United States District Court for the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. § 1407, and they were consolidated for the purposes of appeal to the United States Court of Appeals for the Fifth Circuit:

PONY CREEK CATTLE CO., et al.,
Plaintiffs-Appellants,
MUSSELMAN RANCH CO., et al.,
Plaintiffs-Intervenors-Appellants,
v.
THE GREAT ATLANTIC & PACIFIC TEA CO., et al.,
Defendants-Appellees.

No. CA 3-75-0702-C (N.D. Tex. June 5, 1975)

R. DIRK AGEE, et al.,
Plaintiffs-Appellants,
v.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1237-C (N.D. Tex. September 7, 1976)

MEAT PRICE INVESTIGATORS ASSOC., et al.,
Plaintiffs-Appellants-Petitioners,
v.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-76-1238-C (N.D. Tex. September 7, 1976)

RICHARD S. LOWE, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1244-C (N.D. Tex. September 7, 1976)

A. L. BLACK, et al.,
Plaintiffs-Appellants,

v.

ALBERTSON'S, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1248-C (N.D. Tex. September 7, 1976)

CHAPARRAL CATTLE CORP., et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1253-C (N.D. Tex. September 7, 1976)

BURKE PETERSEN, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1254-C (N.D. Tex. September 7, 1976)

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants-Petitioners,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-76-1361 (N.D. Tex. September 7, 1976)

JOHN O. VARIAN, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1470-C (N.D. Tex. November 8, 1976)

MEAT PRICE INVESTIGATORS ASSOC., et al.,
Plaintiffs-Appellants-Petitioners,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-77-0361 (N.D. Tex. March 16, 1977)

LITTLE RANCH CO., et al.,
Plaintiffs-Appellants,

v.

THE NATIONAL ASSOCIATION OF FOOD CHAINS, et al.,
Defendants-Appellees.

No. CA 3-77-0362-C (N.D. Tex. March 16, 1977)

RONALD BECKER, et al., on behalf of themselves
and all other persons similarly situated,
Plaintiffs-Appellants-Petitioners,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-77-0360 (N.D. Tex. March 16, 1977)

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A. L. BLACK, *et al.*,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, A. L. Black, et al., hereby petition that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered August 17, 1979.

OPINIONS BELOW

The Order of the United States District Court for the Northern District of Texas is appended at App. A-60. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 600 F.2d 1148 (5th Cir. 1979), and is appended at App. A-1. The denial of the Petition for Rehearing and Petition for Rehearing *En Banc* is appended at App. A-55.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment in the above-entitled actions, all cases appealed from the ruling of Judge Taylor of the Dallas Division of the United States District Court for the Northern District of Texas, on August 17, 1979. Rehearing was denied April 24, 1980, and the mandate was stayed pending disposition of this and other petitions. This Petition seeking determination and relief as provided in 28 U.S.C. §2106 was filed within ninety (90) days of the Denial of Rehearing in accordance with 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c). The District Court had and continues to have jurisdiction pursuant to 28 U.S.C. §1337(a).

QUESTIONS PRESENTED

I

1. Do the principles espoused in *Illinois Brick Co. v. Illinois* 431 U.S. 720, *rehearing denied* 434 U.S. 881 (1977), which prevent indirect purchasers from maintaining a cause of action for illegal overcharge due to price-fixing, preclude the maintenance of a cause of action by plaintiffs-petitioners who, as producers-sellers of fat cattle, were forced to sell into a fixed, rigged market for wholesale beef, and were forced to sell at artificially depressed prices caused by defendants' conspiratorial practices attempting to monopolize and monopolizing the beef industry in violation of federal antitrust law.

II

1. Whether Plaintiffs-Petitioners' complaint alleging that "[v]arious other companies and individuals not named defendants in this complaint, participated as co-conspirators in the offenses charged herein and performed acts and made statements in furtherance thereof, and are made Parties hereto as

Class Defendants," (App. A-81), reserving the right to specifically name each and all as defendants emphatically fails to demonstrate an allegation of conspiracy or combination to fix prices between the named defendants and middlemen.

2. Where Plaintiffs-Petitioners sought the filing of a timely and duly tendered amended complaint, was refusal to grant such filing in direct contradiction with the holdings of this Court and clear intendment of Rule 15(a) of the Federal Rules of Civil Procedure.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 15 U.S.C. §15 provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust

laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Federal Rule of Civil Procedure 8(a), (e) and (f), 28 U.S.C. Rule 8(a), (e), and (f), provides:

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A

party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Federal Rule of Civil Procedure 15, 28 U.S.C. Rule 15(a), provides:

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

This is an antitrust action brought by Plaintiffs-Petitioners as fat cattle producers-sellers against Defendant supermarket chains and the supermarkets' trade association, for violation of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, seeking injunctive relief and treble damages for injury to Plaintiffs-Petitioners' businesses and properties, 15 U.S.C. §15, 26. Such damages were the direct and proximate result of the defendants' unlawful conspiratorial actions to monopolize the beef industry resulting in the fixing and artificially depressing the price of fat cattle. Defendants' monopsonistic and oligopsonistic practices, which violated the federal antitrust laws, deprived Plaintiffs-Petitioners of a fair and reasonable price properly based upon the natural interaction of supply and demand in a free market system, a price which would have existed but for the anticompetitive, unlawful acts of the Defendants as alleged.

The Plaintiffs-Petitioners filed this action on December 30, 1975, in the United States District Court for the Northern District of Texas, Amarillo Division. The Plaintiffs are individual and corporate cattle feeders, seven in number, all residents of Texas. They are engaged in the business of producing fattened cattle to be sold when ready for slaughter. The action originally named seventeen chain store defendants in the National Association of Food Chains. Settlements were made with four Defendants, leaving thirteen in the case. Defendants filed a Motion to Dismiss and for Judgment on the Pleadings under Rule 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure on June 17, 1977, predicated on the then recent decision of *Illinois Brick Co. v. Illinois, supra.*

The Trial Court entered its Order of Dismissal on the Rule 12(b) Motion, basing its reasoning on the holding of *Illinois Brick Co. v. Illinois, supra.* The District Court's Final Order, after Plaintiffs had duly tendered amendments to their complaints, was entered December 9, 1977, dismissing with prejudice. (App. A-60).

The Plaintiffs duly appealed to the United States Circuit Court of Appeals for the Fifth Circuit. On August 17, 1979, that Court entered judgment, reversing and remanding all the consolidated appealed cases to the District Court for the Northern District of Texas for further proceedings. The Mandate was stayed. (App. A-52 and A-56). The judgment:

(1) agreed with the District Court that *Illinois Brick* applies to an indirect producer-seller, but held that a producer-seller forced to sell in a rigged market could maintain his civil antitrust action on a "functional equivalent" to a "cost-plus exception" to *Illinois Brick*;

(2) that the Court held that the complaint failed to allege a co-conspiracy between supermarket, the chain stores, and the packers; and

(3) that the District Court did not err in sustaining Defendants' Rule 12(b) Motion to Dismiss with Prejudice and to deny plaintiffs to amend under Rule 15, Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

I. THIS CASE SHOULD BE REVIEWED BECAUSE THE APPLICATION OF *ILLINOIS BRICK CO. V. ILLINOIS*, TO MONOPSONISTIC AND OLIGOPSONISTIC PRACTICES WHICH VIOLATE THE FEDERAL ANTITRUST LAWS IS OF MAJOR IMPORTANCE TO THE APPLICATION OF THE LAW AND THE ADMINISTRATION OF JUSTICE.

This Court has recognized the seriousness of monopsony or oligopsony at the dominant position of the market place. If a violation of the antitrust laws occurs in this critical position, the entire market place is directly affected and injured. As this Court noted in *United States v. Patten*, 226 U.S. 525 (1912), with regard to allegations concerning the defendant's alleged "cornering" of the cotton market:

> "It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to *thwart the usual operation of the laws of supply and demand*, withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition." *Id.* at 542 (emphasis added).

In another monopsony case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court again recognized that a conspiracy, which exists in that position of the market where a commodity is purchased and put into the stream of commerce is the critical position of the entire market. "And

those who [are] in that strategic position would have it in their power to destroy or drastically impair the competitive system." *Id.* at 221.

Therefore, to violate the antitrust laws in this key position is not just an individualized injury, which occurs when there is an overcharge passed through a chain of distribution to an ultimate consumer as in *Illinois Brick, supra,* but is instead an injury which permeates the entire market place, "directly interfering with the free play of market forces." *Socony-Vacuum,* 310 U.S. at 221. In the present case, Plaintiffs have alleged that Defendants have conspired together to restrain trade in the entire market for the production, slaughter and purchase of beef. Defendants have chosen as their tool, for the manipulation of this market, the price they have agreed to pay for fresh frozen processed beef. Defendants, who existed in the key position of the market place, were therefore able to manipulate and rig the entire market place by their conspiracy, a market into which Plaintiffs were forced to sell their live cattle which are a perishable commodity and in the short-term inelastic.

The Fifth Circuit, in the opinion below, stated:

> "The Plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly, is that the activities of the alleged price-fixing conspiracy depressed [the] wholesale prices generally. . . ." *In re Beef Industry Antitrust Litigation,* 600 F.2d 1148 (5th Cir. 1979) (App. A-40, n. 24).

Thus, the gravamen of Plaintiffs' complaint is that Plaintiffs are damaged, by the artificially depressed prices in the market into which they are compelled to sell a perishable fungible product.

The Fifth Circuit refused to recognize the distinction between a monopsony or an oligopsony which violates the antitrust laws in a dominant position of an industry's productive chain, and that which was addressed by this Court in the *Illinois Brick* decision, where an overcharge was passed through several levels of distribution finally arriving at the ultimate consumer having been distorted by each level of distribution. The case presently before this Court is clearly not an "overcharge" case, but a case in which the Defendants chose price as their tool to manipulate an entire market in which Plaintiffs participated, and in which Plaintiffs were damaged. Simply because the Defendants chose to use pricing as their tool does not mean that *Illinois Brick* is instantaneously invoked.

In interpreting *Illinois Brick*, the Third Circuit stated:

> "A different problem is presented where prices are fixed below the competitive market price or where Defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since Defendants' benefits in those instances are not so readily ascertainable and may not be sufficient to compensate 'those individuals whose protection is the primary purpose of the antitrust laws.' In such circumstances Courts have awarded damages based upon the amount of injury suffered by Plaintiffs rather than the benefits derived by the Defendants." *Midwest Paper Products v. Continental Group, Inc.*, 596 F.2d 573, 585 n. 47 (3rd Cir. 1979).

Here, such a "different problem" is presented in that Defendants used their position of dominance in the middle of the productive chain of the market place in order to fix prices below competitive market prices, and thus effectively control

the entire market place. Plaintiffs are simply seeking to recover those damages they have sustained because of such interference with the free play of market forces, rather than trying to recoup any of the benefits which may have been derived by the Defendants.

The Fifth Circuit's Opinion below states that this Court's decision in *Illinois Brick* is to have "general applications" (App. A-26), including those cases in which price is used in order to monopolize a market in violation of Section 2 of the Sherman Act.

Surely this Court did not overrule *sub silentio* ninety years of antitrust law in practice in *Illinois Brick* nor did it intend for *Illinois Brick* to be applied to all Section 1 and 2 cases, regardless of their form, whenever pricing was involved. To hold thus, would be contrary to the prior rulings of this Court, the legislative intent of the Sherman and Clayton Acts, and discourage the enforcement of the antitrust laws which is contrary to this Court's holding in *Hanover Shoe v. United Shoe Machine Corp.*, 392 U.S. 481 (1968).

II. THERE IS A GROWING DIVERGENCE AMONG THE CIRCUIT COURTS ON THE ISSUE OF THE APPLICATION AND SCOPE OF *ILLINOIS BRICK*, AND UNLESS DIRECTION IS GIVEN BY THIS COURT, THE CONFUSION GENERATED WILL LEAD TO AN EROSION OF THE ANTITRUST LAWS.

Since the announcement of the decision in *Illinois Brick* in 1977, the various courts throughout the United States have been groping with the decision in the context of enumerable motions for summary judgment and motions under Rule 12(b) for dismissal for failure to state a cause of action.

The Third Circuit has held that they will apply *Illinois Brick* only in an overcharge situation, in which the illegal overcharge is passed through a chain of distribution. *Midwest Paper, supra.* This line of thinking has been followed by other Courts within that circuit, *Dart Drug Corp. v. Corning Glass Works,* 480 F.Supp. 1091 (D.C. Md. 1979), and in *In re Japanese Electronic Products Antitrust Litigation,* M.D.L. No. 189 (E.D. Pa. Opinion filed May 5, 1980). Both of these cases base their opinions, in large part, on Note 47 of *Midwest Paper Products, supra.* In *Dart Drug Corp.,* the Court states:

> "The foregoing review of the rationale of *Illinois Brick* makes it abundantly clear that the case bars suit *only* in those situations where Plaintiff's injury is premised on a 'overcharge' in where, in order to prove that injury, Plaintiff must also demonstrate that persons in the chain of distribution between Plaintiff and the antitrust violator passed on the overcharge to Plaintiff." 480 F.Supp. at 1101 (emphasis added).

In *In re Japanese Electronic Products Antitrust Litigation, supra*, the Court declines to apply *Illinois Brick* where, "the amount of injury suffered by the Plaintiff rather than the benefits derived by the Defendants . . ." are the measure of damages, again citing Note 47 of *Midwest Paper Products.*

The Seventh Circuit in the case of *Fontana Aviation, Inc. v. Cessna Aircraft Company*, No. 79-1863 (7th Cir. Opinion filed March 19, 1980), refused to apply *Illinois Brick* where the defendant's pricing policy was alleged to be part of a "multi-faceted conspiracy" causing competitive injury to the plaintiff. Here again, the plaintiff was suing for the damage he suffered by reason of the violation, rather than the disgorgement of illegally obtained profits by the defendant. The plaintiff was only seeking to recover the amount of injury he had suffered as a proximate cause of the violation. *See Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906).

In *In re Uranium Antitrust Litigation*, 473 F.Supp. 393 (N.D. Ill. 1979), the District Court again focuses on how plaintiff was injured in determining whether or not to apply *Illinois Brick.* There the Court stated:

> "Counterclaimants fit within the class of '. . . those that have been injured by [alleged] restraints imposed by Defendant on competitive forces in the economy.'" *Id.* at 403.

The Fifth Circuit, although recognizing Plaintiffs' claim of damage to the market (App. A-40, n. 24), and that Plaintiffs' complaint further alleges that "(c) [Plaintiffs'] sold their livestock for less than they would have in an open and competitive market" (App. A-98), held that *Illinois*

Brick was of such general application that it applied to a case where the market was allegedly manipulated by use of price, and where the Defendants monopolized and attempted to monopolize said market by use of price. The Fifth Circuit's tortuous reasoning finally arrives at a point wherein they will allow Plaintiffs to continue their lawsuit, applying *Illinois Brick*, involving the "cost-plus" contract exception.

The Fifth Circuit further stated that it saw nothing "special about monopsony or oligopsony price fixing cases that justifies treating them from monopoly price-fixing cases. . . ." (App. A-26). This statement is clearly at odds with the Third Circuit's opinion in *Midwest Paper* where it recognizes a difference between an undercharge and overcharge case. *Midwest Paper*, 596 F.2d at 585, n. 47.

Unless this Court addresses the issues raised in this case (especially in light of the Fifth Circuit's prophalactic application of *Illinois Brick*), there is a serious likelihood that there will be further divergence of the already multiple points of view regarding the scope and application of *Illinois Brick* within the Circuits, to the end that there will be non-uniform application of the antitrust laws within the United States.

III. THE IMPORTANT ISSUE OF THE SCOPE AND PRINCIPLES OF RULES 8(a), (e) AND (f) OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE DECIDED BY THIS COURT. ANTITRUST VIOLATORS SHOULD NOT BE ABLE TO ESCAPE LIABILITY AND RETAIN THEIR ILL-GOTTEN GAINS FROM PRACTICES VIOLATIVE OF FEDERAL ANTITRUST LAWS DUE TO THE RIGHTFUL EXERCISE OF AN OPTION BY THE PLAINTIFFS NOT TO SPECIFICALLY DENOMINATE UNKNOWN DEFENDANTS.

Rules 8(a), (e) and (f) of the Federal Rules of Civil Procedure require only "simplified notice pleading . . ." (*Conley v. Gibson*, 355 U.S. 41, 48 [1957]): "No technical forms of pleadings are required"; and "All pleadings shall be so construed to do substantial justice."

Plaintiffs-Petitioners' First Amended and Substituted Complaint alleges:

> CO-CONSPIRATORS
>
> Various other companies and individuals not named Defendants in this complaint, participated as co-conspirators in the offenses charged herein and performed acts and made statements in furtherance thereof, and are made Parties hereto as Class Defendants. (App. A-81).

It is axiomatic that when a complaint is the subject of motions under Rules 12(b)(6) or 12(c) of the Federal Rules of Civil Procedure, the Court must take all allegations in the complaint as true, together with all inferences and intendments thereto; only if there is *no set of facts* under which the Plaintiff could recover, should the Court grant a dismis-

sal with prejudice. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Walker Process Equip. v. Food Mach. Chem. Corp.*, 382 U.S. 172, 175 (1965); *Conley v. Gibson, supra.* Furthermore, a plaintiff suing under the federal antitrust laws is not required to sue all members of the combination or conspiracy. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1244 n. 42 (3rd Cir. 1975); *National Wrestling Alliance v. Myers*, 325 F.2d 768, 775 (8th Cir. 1963); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23 (6th Cir. 1903) *aff'd*, 203 U.S. 390 (1906).

When viewing the Amended and Substituted Complaint in the light most favorable to the Plaintiffs, giving the Plaintiffs the benefit of all reasonable intendments and inferences thereto and liberally construing the same, the Amended and Substituted Complaint supports a finding that a vertical conspiracy in violation of the antitrust laws has existed between the Defendant supermarkets and middlemen which depressed fat cattle prices—the target of which has been the cattle producer. The Amended and Substituted Complaint alleges that other coconspirators and other concurrent conspiracies have jointly and/or severally and/or concurrently injured Plaintiffs in their businesses and properties and performed acts and made statements in furtherance thereof.

It is well established that "a vertical combination or combination of non-competitors may conspire to restrain unreasonably the interstate trade and commerce of third parties and thereby subject themselves to the prohibitions of the Sherman Act." *United States v. General Motors Corp.*, 121 F.2d 376, 404 (7th Cir. 1941), *cert. denied*, 314 U.S. 618, *rehearing denied*, 314 U.S. 708 (1941). Indeed, *United States v. Parke,*

Davis & Co., 362 U.S. 29, 45 (1960), involved a three-tier conspiracy among manufacturer, wholesalers and retail sellers aimed at retail purchasers. Further, it is well established that facts similar to those alleged in this Amended and Substituted Complaint can establish a combination and conspiracy in restraint of trade and a combination to monopolize aimed at producers such as the Plaintiff fat cattle producers (*American Tobacco Co. v. United States*, 328 U.S. 781 [1946]; *Swift & Co. v. United States*, 196 U.S. 375 [1905]), and such allegations give rise to a private damage action under Section 4 of the Clayton Act by producers such as the Plaintiffs. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

Therefore, the scope and principles of Rules 8(a), (e) and (f) of the Federal Rules of Civil Procedure should be found to have intended the inclusion of the denomination of "unnamed co-conspirators".

IV. THIS CASE SHOULD BE REVIEWED BY THIS COURT BECAUSE THE SCOPE AND INTENT OF RULE 15(a) WAS NOT TO BE INTERPRETED AS DENYING A RIGHT TO AMEND PRIOR TO DISCOVERY, EFFECTIVELY PRECLUDING DAMAGED ANTITRUST PLAINTIFFS FROM A PROPER CAUSE OF ACTION AND ALLOWING ANTITRUST VIOLATORS TO ESCAPE LIABILITY.

Rule 15(a) of the Federal Rules of Civil Procedure (App. A-110) provides that the Trial Court shall freely grant leave to amend the pleadings "when justice so requires." As stated by this Court, "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). *Accord, Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69 (5th Cir. 1961).

Although the District Court concluded that the actions were appropriately dismissed with prejudice under *Illinois Brick* and that "justice does not require leave to amend" (App. A-64), the District Court failed to make any findings to support its conclusions.

> [T]he grant or denial of an opportunity to amend is within the discretion of the District Court, *but outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. Foman v. Davis*, 371 U.S. 178, 182 (1962). *Accord, Griggs v. Hinds Junior College*, 563 F.2d 179 (5th Cir. 1977); *Scott v. Eversole Mortuary*, 522 F.2d 1110 (9th Cir. 1975); *Sarter v. Mays*, 491 F.2d 675 (5th Cir. 1974). (emphasis added)

Even though the District Court provided no reasons for its refusal to allow the Plaintiffs leave to amend, the Circuit Court affirmed the refusal upon its independent conclusions

that there was undue delay and amendment would be futile. (App. A-31 through A-34). The Circuit Court erred in concluding that there was undue delay in the absence of supportive findings that indicate that the Defendants are prejudiced thereby. *Griggs v. Hinds Junior College, supra*; *Lone Star Motor Import, Inc. v. Citroen Cars Corp., supra.* The Circuit Court also erred in concluding that granting leave to amend would be futile because: *Illinois Brick* applies to overcharges paid by purchasers—not to sellers into a rigged market; plaintiffs are not required to sue all co-conspirators; and "[t]he Plaintiffs' theory of damages is not in all respects a pass-on type of theory." (App. A-40, n. 24).

> Granting leave to amend is especially appropriate, in cases such as this, when the trial court has dismissed the complaint for failure to state a claim. *Griggs v. Hinds Junior College, supra* at 180.

The Circuit Court recognized, in holding that Plaintiffs had stated a claim under the cost-plus exception to *Illinois Brick,* that there are facts, if proved, that would allow Plaintiffs to recover under the antitrust law of the United States.

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. *Foman v. Davis, supra.*

Therefore, the Circuit Court erred in affirming the District Court's denial of Plaintiffs' Motion for leave to amend their pleadings to include an alternate theory of recovery.

In sum, a denial of Plaintiffs' right to amend permits alleged antitrust wrongdoers to go "scot free", precludes assertion of a proper cause of action and unfairly interferes with antitrust Plaintiffs' rights to prove their damages.

CONCLUSION

In the interests of assuring effective enforcement of the federal antitrust laws, insuring even-handed administration of justice, and protecting the existence of a competitive and free market system, the Petitioners respectfully request that this Court grant Petitioners' Petition for a Writ of Certiorari in these causes of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court has caused to be served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendices thereto upon all Plaintiffs Counsel of record and upon all Defendants Counsel of record in these proceedings contained within the most recent Liaison Counsel and attorneys list.

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